

FEDERAL MAGISTRATES COURT OF AUSTRALIA

CHUN v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1718

MIGRATION – Application for spouse visa – delegate not satisfied that parties in genuine spousal relationship – application to Migration Review Tribunal unsuccessful – no jurisdictional error shown – application dismissed.

Migration Act 1958

Migration Regulations 1994, reg.1.15A

Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors (1996) CLR 259

R v Cahill [1978] 2MS WLR 453

Applicant:	JUNG HWA CHUN
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1637 of 2006
Judgment of:	Burchardt FM
Hearing date:	24 October 2006
Date of Last Submission:	24 October 2006
Delivered at:	Melbourne (via video link to Sydney)
Delivered on:	7 December 2006

REPRESENTATION

Counsel for the Applicant: Mr Young

Solicitors for the Applicant: Biliias & Associates

Counsel for the Respondents: Ms Clegg

Solicitors for the Respondents: Sparke Helmore Lawyers

ORDERS

- (1) The application filed 8 June 2006 be dismissed.
- (2) The Applicant shall pay the First Respondent's costs fixed in the sum of \$5,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 1637 of 2006

JUNG HWA CHUN
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. By application filed on 8 June 2006 the Applicant seeks judicial review of a decision of the Second Respondent the Migration Review Tribunal (“the Tribunal”) handed down on 11 May 2006. The application contained four grounds of application of which ground two was expressly abandoned in the Applicant’s written submissions. The remaining grounds were as follows:

“1. The Mitration [sic] Review Tribunal made jurisdictional error in that having found at paragraph 81 that there was no evidence to suggest that the marriage was contrived in relation to whether the couple were in a genuine and continuing relationship, the Tribunal took into account an irrelevant consideration, mainly the size the wedding

ceremony and the lack of family members of the sponsor in attendance.

2. ...

3. The Tribunal make [sic] jurisdiction error by failing to make a decision as to whether the Applicant and her sponsor were in a married relationship and instead adopted a test of whether there was “sufficient satisfactory evidence” of a married relationship.

4. The Tribunal make [sic] jurisdictional error by adopting a non statutory and undefined requirement of “sufficient satisfactory evidence” before the Tribunal could make a decision that the Applicant and her spouse were in a married relationship”.

2. The Applicant is a national of the republic of Korea born on 5 August 1967.
3. The Applicant’s personal history was set out in some detail in the Tribunal’s reasons for decision at paragraphs 9 to 21 (CB 146 – 147)
4. That history included the following findings which do not appear to me to be controversial.

The Applicant was sponsored in connection with a Subclass 820 (Spouse) visa by Gregory Wilhelmus Hamilton (“the Sponsor”);

The Applicant previously held a number of Class UA visas and student visas between 1991 and 1998, the most recent of which relevantly was granted on 5 January 1996 and which was valid until 6 April 1998;

The Applicant remained in Australia after her visa expired on 6 April 1998 until 3 November 2001 at which point she left Australia having been detained by Departmental Officers at a massage parlour;

The Applicant and the Sponsor alleged that they met in February 2001 at a Buddhist temple in Wollongong at which time they were both living in Sydney;

The Sponsor followed the visa Applicant to Korea in December 2001 where the Sponsor and the Applicant claimed to have lived in a de facto relationship;

The Sponsor returned to Australia in about March 2003;

The Applicant lived in Bali at the Sponsor's expense between 30 May 2003 and October 2003;

On 16 October 2003 the visa Applicant was granted a Prospective Marriage (Temporary)(Class TO) visa subclass 300 (Prospective Marriage);

The Applicant arrived in Australia on that Prospective Marriage visa on 23 October 2003 and lived with the Sponsor and the Sponsor's sister in Perth for some months;

The Applicant moved to Sydney in about February 2004 to be near friends;

On 5 May 2004 the Applicant was located at a massage parlour, the same massage parlour at which she was apprehended in 2001 by Departmental Officers;

In June 2004 the Applicant returned to Perth and the Applicant married the Sponsor on 8 July 2004 at which the only wedding guest was one of the Sponsor's friends Mr Ashley Wilson;

The Applicant applied for a Partner (Temporary)(Class UK) visa on 9 July 2004 in Perth;

5. On 10 September 2004 a delegate of the First Respondent rang the Applicant in Perth to arrange an interview but was told by the Sponsor that the Applicant was in Sydney working. A phone call from the delegate to the Applicant established that this was so but the Applicant agreed to be interviewed in Perth on 15 September 2004.
6. On 15 September 2004 both the Applicant and the Sponsor were interviewed separately by the delegate in Perth. They gave accounts of their relationship set out in paragraphs 26 and 27 of the Tribunal's reasons for decision. (CB 148 – 149).

7. On 2 December 2004 the Applicant was interviewed by the delegate in Perth following an earlier endeavour by the delegate to meet the Applicant on 30 November 2004. On 2 December 2004 the Applicant initially asserted she had been at the Sponsor's home on 30 November 2004 but subsequently stated she had been in Sydney at a Buddhist temple. The Applicant had answered a number of questions from the delegate in terms set out in paragraph 29 of the Tribunal's reasons for decision. (CB 149).
8. On 21 December 2004 the delegate refused the Applicant's application and gave reasons for that refusal. The delegate found that the Applicant did not meet the definition of "spouse" because the couple were living separately and apart on a permanent basis.
9. The Applicant lodged her application for review on 24 January 2005 and submitted further material including credit card records in the Sponsor's name and bank statements for a joint account to the Tribunal by January 2005.
10. The subsequent progress of the matter to the Tribunal, including the hearing conducted by it, are detailed in paragraphs 31 to 42 of the Tribunal's reasons for decision (CB 150 – 152).
11. The Tribunal approached its findings on the evidence by first setting out the statutory background against which it was required to consider the application. In particular at paragraph 48 (CB 153 – 155) the Tribunal set out regulation 1.15A of the *Migration Regulations 1994* ("the Regulations"), or at least those parts of it that were relevant, in full. The Tribunal then set out in paragraph 49 a series of bullet points that effectively summarise the terms of regulation 1.15A of the Regulations and then proceeded to examine the material before it against those criteria. The Tribunal proceeded relevantly at paragraphs 56 to 79 to traverse all the subsections contained in regulation 1.15A(3).
12. It is plain from the introductory remarks in paragraph 56 of the Tribunal's reasons that the Tribunal was concerned to form what might be described as a global view of the relationship between the parties against the relevant circumstances required to be considered by sub-regulation 1.15A(3) of the Regulations. In submissions before me

counsel for the Applicant asserted that while in paragraphs 57 to 79 of its decision the Tribunal noted a number of matters, it made no findings. At worst in his submission the matters set out in those paragraphs were neutral so far as any findings were made in respect of the Applicant. From this base proposition counsel for the Applicant submitted that there were two criticisms properly to be made of the Tribunal's reasoning.

13. First, it was submitted that the Tribunal in effect created a test that was not that in the legislation namely whether or not there was "sufficient satisfactory evidence" that the relationship was genuine and continuing. It was submitted (see paragraphs 20 to 25 of the Applicant's written submissions) that the Tribunal should have determined whether it was satisfied on the evidence before it that the couple were in a genuine and continuing relationship, and that there was no need for the Tribunal to be satisfied that there was sufficient satisfactory evidence of the relationship. It was submitted that (paragraph 22 of the Applicant's written submissions) "in introducing this concept the Tribunal was incorporating a formula without any jurisdictional basis."
14. The second substantive criticism advanced of the Tribunal's decision was that it was internally inconsistent in a very material way. It was submitted that in paragraphs 80 and 81 of its reasons for decision the Tribunal made a positive finding that there was no evidence that the marriage was contrived. That finding was said to be at odds with the bullet point in paragraph 83, treated as adverse to the Applicant by the Tribunal that "the couple married in a very small ceremony with only one witness. The lack of the Sponsor's family members attending the wedding". It was submitted that that latter finding was irrelevant in the face of the earlier finding that there was no evidence that the marriage was contrived.
15. Counsel for the First Respondent submitted that the decision must be looked at as a whole, that the Tribunal need not make findings in respect of every aspect of the evidence, that the Tribunal did not in fact incorporate an inappropriate test and was simply stating in paragraph 83 why it was that it had not achieved the required satisfaction imposed by the Regulations. She further submitted that the finding at paragraph

83 of its reasons to which I have referred was not in fact inconsistent with paragraphs 80 and 81. Once again counsel for the First Respondent submitted that the decision must be taken as whole in order to be understood fairly. She referred to the well known observations of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) CLR 259 (“Wu Liang Shan”) at [30] – [31] in this regard.

16. I will take the second point argued by counsel first.
17. In paragraph 80 the Tribunal, having considered regulation 1.15A, noted that the motive for a marriage is irrelevant and quoted an extract from the judgment of the Full Federal Court in *Minister for Immigration Local Government & Ethnic Affairs v Dhillon* (unreported 8 May 1990). That extract referred to the judgment of the Primary Judge in that case in which his Honour Lee J cited remarks of Street CJ in *R v Cahill* [1978] 2MS WLR 453 at page 458.
18. Having cited that extract the Tribunal went on to say:

“In the Tribunal’s view there is no evidence to suggest that the marriage was contrived according to the meaning of the word as discussed by Justice Lee at first instance in Dhillon v Minister for Immigration Local Government & Ethnic Affairs [1989] 17 ALD 552 – 555 and noted on appeal (supra).”
19. I have studied the reasons for decision of Justice Lee in the report quoted by the Tribunal and the passage to which I infer the Tribunal was referring at page 555 of that report is as follows:

“According to the shorter Oxford English Dictionary “contrived” has the following meaning “1. To invent, devise, excogitate with ingenuity and cleverness. 2. ... to form devises: to plot, conspire ... 3. To devise design ... 4. To find out ... 5. To concoct, fabricate.”
20. It is not altogether easy to reconcile the definition just quoted with the dot point finding in paragraph 83 of the Tribunal’s reasons for decision which placed emphasis upon the fact the couple married in a very small ceremony with only one witness and the lack of the Sponsor’s family members, who did not attend the wedding.

21. It may be that what the Tribunal was seeking to advert to in paragraph 81 of its reasons for decision was simply that there was no positive evidence supporting the proposition that the marriage was contrived as discussed by Justice Lee.
22. This might be said not to be inconsistent with the proposition that evidence of the sort referred to in paragraph 83 of the Tribunal's reasons for decision was of some probative force in the overall assessment the Tribunal was required to make as to whether or not the parties were in a genuine and continuing relationship at the time of application and at the time of decision.
23. Taking the Tribunal's reasons as a whole, (and accepting the force of the High Court's decision in *Wu Liang Shan*), in my opinion one must accept, whatever infelicities of drafting there may be in the Tribunal's reasons for decision, that the Tribunal did not regard the marriage of the Sponsor and the Applicant as being free from question. The matters set out in paragraph 83 of the Tribunal's decision are clearly to this effect.
24. This brings me to the broader considerations raised by the Applicant's first submission.
25. The Tribunal was required, if the Applicant was to be successful, to reach a state of satisfaction that the Applicant was the spouse of the Sponsor. This required the Tribunal to achieve that state of satisfaction in the light of the matters set out in sub-regulations (1A) and (3) of regulation 1.15A. Questions of onus of proof are not necessarily helpful in considering administrative decisions of this character. Nonetheless, it is still for the Applicant as the party seeking relief to put forward material to bring the Tribunal to the required state of satisfaction.
26. While the terms at paragraph 83 of the Tribunal's decision might have been better expressed, it is clear that the matters set out in that paragraph were not the only factors that led the Tribunal to the conclusion it reached. The Tribunal relevantly said "these factors include:" [Emphasis added].

27. In the ultimate, notwithstanding my reservations as to the possible inconsistency between paragraphs 81, 82 and 83 of the Tribunal's reasoning, I am persuaded that the Tribunal looked at all the evidence before it and properly addressed the matter before it.
28. Taking the Tribunal's reasons as a whole, it seems to me that the Tribunal was properly seized of the issue it had to determine, namely whether the Applicant was the spouse of the Sponsor at the relevant times, and more particularly whether the parties were in a genuine and continuing relationship at those times.
29. I do not accept in the ultimate the submission for the Applicant that the Tribunal created a further statutory test. Taking the Tribunal's reasons as a whole I believe that the Tribunal addressed the issue that it was required to address and did not take into consideration irrelevant materials.
30. The fact that the Applicant's wedding was attended by only one other party and by none of the Sponsor's family members was in my view not an irrelevant finding and one which, together with the other matters to set out in the Tribunal's decision caused the Tribunal properly to reach the decision that it did.
31. In saying this I should emphasise that I am not seeking to review the merits of the case. Rather I have set out some, but not all of the materials in the Tribunal's reasons for decision in an endeavour to show that the Tribunal did in fact properly address the issue before it, and for those reasons therefore I do not accept that the Tribunal fell into error.
32. It follows that the application must be dismissed and I also order that the Applicant pay the First Respondent's costs.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Burchardt FM.

Associate: Brooke Evans

Date: 7 December 2006